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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 DANIEL GUFFEY,

12
13 Petitioner,

14 vs.

15 RICHARD SUBIA, Warden, et al.,

16 Respondents.
17

Civil No. 07cv1620-IEG (CAB)

**REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE
JUDGE RE DENIAL OF PETITION
FOR WRIT OF HABEAS CORPUS**

18 This Report and Recommendation is submitted to Chief United States District Judge Irma
19 E. Gonzalez pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule HC.2 of the United States
20 District Court for the Southern District of California.

21 **I.**

22 **FEDERAL PROCEEDINGS**

23 Daniel Guffey (hereinafter “Petitioner”), is a state prisoner proceeding pro se with a
24 Petition for a Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254.
25 (Doc. No. 1.) Petitioner challenges his San Diego County Superior Court convictions for second
26 degree murder and conspiracy to commit assault, claiming that his federal constitutional rights
27 were violated because: (1) there was insufficient evidence to support the murder conviction; (2)
28 the failure to sever his trial from his co-defendants violated due process; and (3) the admission

1 of a co-defendant's extrajudicial statement violated Petitioner's right to confront and cross-
2 examine witnesses. (Pet. at 6-9.)

3 Respondent has filed an Answer to the Petition with an incorporated Memorandum of
4 Points and Authorities in support thereof, and has lodged portions of the state court record.
5 (Doc. No. 25.) Respondent contends that habeas relief is unavailable because the state court's
6 adjudication of Petitioner's claims involved an objectively reasonable application of clearly
7 established federal law. (Memorandum of Points and Authorities in Support of Answer ["Ans.
8 Mem."] at 16-23.) Petitioner has filed a Traverse with an attached Notice of Lodgment. (Doc.
9 No. 29.)

10 II.

11 STATE PROCEEDINGS

12 In a two-count Second Amended Information filed in the San Diego County Superior
13 Court on April 18, 2003, Petitioner and his two co-defendants, Jesse Lyle Gehrke and
14 Christopher Smith, were charged with conspiracy to commit assault in violation of Cal. Penal
15 Code section 182(a)(1), and murder in violation of Cal. Penal Code section 187(a). (Lodgment
16 No. 2, Clerk's Transcript ["CT"] at 26-28.) It was also alleged that Gehrke and Smith personally
17 used a knife during the commission of the murder. (CT 27-28.)

18 On May 23, 2003, a jury found Petitioner guilty of second degree murder and conspiracy
19 to commit assault. (CT 527-28.) The same jury found co-defendants Gehrke and Smith guilty
20 of first degree murder and conspiracy to commit assault, and returned true findings that they
21 personally used a knife during the commission of the offenses. (CT 330-31, 621-22.) On
22 September 18, 2003, Petitioner was sentenced to a state prison term of 15 years-to-life. (CT
23 564.) Gehrke was sentenced to 57 years-to-life and Smith to 27 years-to-life. (CT 421, 650.)

24 Petitioner appealed his conviction to the California Court of Appeal, Fourth Appellate
25 District, Division One, raising, *inter alia*, all claims presented in his federal habeas Petition here.
26 (Lodgment Nos. 9-10.) The appellate court consolidated Petitioner's appeal with that of his two
27 co-defendants, and affirmed the convictions in an unpublished opinion. (Lodgment No. 6,
28 People v. Gehrke, et al., D042984, slip op. (Cal.Ct.App. Jan. 31, 2006).) Petitioner thereafter

1 filed a petition for review in the state supreme court raising the claims presented here.
2 (Supplemental Lodgment No. 8.) That petition was consolidated with the petitions for review
3 filed by Petitioner's co-defendants, and denied by an order which stated in full: "Petitions for
4 review DENIED." (Lodgment No. 8.)

5 II.

6 UNDERLYING FACTS

7 The following statement of facts is taken from the appellate court opinion affirming
8 Petitioner's conviction on direct review. This Court gives deference to state court findings of
9 fact and presumes them to be correct. See Sumner v. Mata, 449 U.S. 539, 545-47 (1981) (stating
10 that deference is owed to factual findings of both state trial and appellate courts).

11 Guffey had a romantic relationship with Kathleen Dockler over a period of
12 years and, in the summer and fall of 2001, he lived with her in her trailer home in
13 De Anza Cove. (All relevant dates are in 2001 except as otherwise noted.) In the
14 fall, the relationship between Guffey and Dockler deteriorated and in December
15 Dockler ended the relationship, telling Guffey to move out. Guffey was very
16 upset about the breakup and begged Dockler to give him another chance. Dockler
declined and, shortly thereafter, she began an intimate relationship with Rawson,
a close friend of Guffey's who Guffey had introduced to her in November.
Guffey began stalking Dockler, showing up at places where she was, going to her
home uninvited, calling her repeatedly at her home and on her cell phone and
sending her e-mails.

17 On December 24, Guffey's family saw Dockler and Rawson while they
18 were out to dinner. The next day, Guffey went to Dockler's trailer home and
19 waited inside until Dockler came home, at which time he confronted her about her
20 relationship with Rawson and threatened to kill Rawson and his family. Guffey
21 also told Dockler's friend, Linda Drake, that he was going to "take (Rawson) out"
and that Rawson was not "going to be a problem anymore." Thereafter, Guffey
continued to make frequent calls to Dockler, seeking to resume their relationship.
Dockler and Rawson became nervous about Guffey and began hiding out at
Rawson's parents' house in La Mesa.

22 On approximately December 29, Guffey went to the hotel room where his
23 friend, Bruce Phifer, was living; Guffey was upset about Dockler and asked Phifer
24 to beat Rawson up. Phifer declined, saying that he did not want to get involved
25 but that he would mention it to Gehrke, who worked for his drywall business and
frequently stayed with him. Although Gehrke was in the room at the time, he did
not participate in the conversation; when Guffey left, however, Gehrke followed
him.

26 On December 30, Guffey broke into the Rawsons' home and tried to start
27 a fight with Rawson. Guffey screamed at Rawson, claiming that Rawson was
28 withholding something from Dockler. After Rawson failed to respond to Guffey's
provocation, Guffey grabbed the television remote control from Rawson's hand
and threw it against the wall, breaking it into pieces. Guffey threatened to kill

1 Rawson, left and placed a note on Dockler's car that said "I told you the truth."
2 Dockler and Rawson reported the incident to the La Mesa Police Department.

3 After leaving the Rawsons' house, Guffey went with Gehrke and Phifer to
4 Dockler's trailer. While Dockler and Rawson were waiting for the La Mesa
5 police to arrive at the Rawsons' house, Guffey called and left a message indicating
6 that he had just been inside the trailer. Guffey also made repeated calls to
7 Dockler's cell phone until one of the La Mesa police officers talked to Guffey and
8 told him to stop. Dockler and Rawson gave their report and then went to the
9 trailer to meet with San Diego police about the break in; Dockler discovered that
10 some of her things, including a computer, were gone. As a result of these
11 incidents, Dockler and Rawson decided that they needed to get a restraining order
12 against Guffey.

13 The next day, Guffey called Phifer, looking for Gehrke; Phifer wrote down
14 Guffey's phone number and gave it to Gehrke. Thereafter, Phifer did not see
15 Gehrke, either at work or his motel room, for four or five days.

16 In the early morning hours of January 1, 2002, Guffey e-mailed Dockler a
17 love poem that said in part "by the time that you read this, it will have all come
18 undone." That night, Guffey drove to the Rawsons' neighborhood several times
19 to look for Dockler's car. During the drive, Guffey told a friend, Amber Stanley,
20 that he felt Rawson had betrayed him and asked whether she knew anyone who
21 would help set Rawson up to be the victim of a hit-and-run. Close family friend
22 Jeremiah Beamer later joined Guffey and Stanley for part of the morning; he
23 thought Guffey appeared angry and that his demeanor was "weird." At
24 approximately 4 a.m. on January 2, 2002, Guffey called Phifer, upset and saying
25 that something bad had happened.

26 Meanwhile, on the evening of January 1, 2002, Gehrke and Smith (who
27 also did work for Phifer's business) talked to Kyla Stark, a homeless woman who
28 knew Smith; they told her that they were going to a house in La Mesa to collect
"quite a bit" of money from a man and offered to pay her if she would knock on
the door and help them get inside. The three walked from El Cajon to La Mesa;
they got lost several times and arrived in La Mesa sometime before 9 a.m. the next
morning.

That same morning, Dockler dropped Rawson off at his parents' home and
went to work, with plans to return later in the morning so that they could go get
a restraining order. At approximately 8:15 a.m., Rawson called the La Mesa
police detective to whom he had spoken about the December 30 incident and left
a message. An hour or so later, a neighbor of the Rawsons noticed two men and
a woman who looked out of place walking in the neighborhood.

Later in the morning, Stark, Gehrke and Smith went to the Rawsons' house
and knocked on the door; Rawson, who was alone in the house, recognized
Gehrke and invited them all to come inside. In the same time frame (sometime
between 11 and 11:15 a.m.), a woman who was working nearby saw Guffey's van,
which was distinctive because it had the logo and phone number of his locksmith
business on the side, driving very slowly down the street in front of the Rawsons'
house.

Once inside the house, Gehrke and Smith sat and talked with Rawson for
a half hour or so, while Stark wandered around the house, looking at the
Christmas decorations and Mrs. Rawson's dollhouse. During this time, Gehrke
used Rawson's phone to call Guffey's cell phone. After hanging up, Gehrke

1 indicated to the group that Rawson's girlfriend was coming over in 20 minutes to
2 bring some money. Sometime between 11:15 a.m. and 11:30 a.m., Dockler called
3 the Rawsons' house to tell Rawson she was running late; a female answered the
4 phone and Dockler asked to speak to Rawson. The woman passed the phone to
5 Smith and, although Dockler did not recognize his voice, she told him that she was
6 on her way.

7 Stark went to the kitchen to get some cookies to eat and heard Smith say
8 "stay down" several times. She went back to the living room and saw Gehrke and
9 Smith stabbing Rawson repeatedly and trying to keep him down on the floor as he
10 fought to escape out the front door. Stark was scared and tried to leave, but Smith
11 grabbed the back of her shirt, telling her to sit down and shut up or she would be
12 next. As Rawson struggled with the two men, Smith grabbed him and slit his
13 throat; Rawson fell near the front door, blocking it.

14 There was "blood everywhere," which made Stark nauseous, and she ran
15 to the bathroom and got sick. By the time she came out of the bathroom, Gehrke
16 and Smith had left the house, jumped the fence and were running down the street.
17 Stark yelled at the men to wait because she did not know how to get back to El
18 Cajon, but they kept running, taking off their shirts as they did so.

19 In the meantime, after leaving the Rawsons' neighborhood, Guffey drove
20 to Mission Valley to pick up Amber Stanley. While he was in the parking lot of
21 the hotel where Stanley was staying, he received Gehrke's call from the Rawson's
22 home phone. Stanley noticed that Guffey was wearing the same clothes as he had
23 on the prior night, but was "really agitated" and appeared to have injuries on his
24 hands. Guffey told Stanley that he had slapped Rawson around and "got(ten)
25 (Rawson) good"; Guffey was prone to bragging, so Stanley did not believe him,
26 but she was frightened by his behavior.

27 Shortly after noon, Gehrke and Smith showed up unexpectedly at the El
28 Cajon home of Robert Bunch, an acquaintance of Smith's; they were sweating and
asked if they could come in to clean themselves up. The men stayed for about 30
minutes, during which time they washed their hands in the kitchen and Smith used
Bunch's cell phone to call Guffey.

Dockler arrived at the Rawsons' house at about noon, but was unable to get
inside. After a period of time, Rawson's parents came home and with Dockler,
discovered Rawson's body; he had been stabbed multiple times and his neck had
been slit. The coroner concluded that Rawson had been dead for at least a couple
of hours by the time his parents found him. Police arrested Guffey that evening;
Guffey called Beamer from jail and told him to not say anything to the police
about their drive in the Rawsons' neighborhood the prior morning because doing
so could affect Beamer's military career.

The next morning, Stark bumped into Smith in an alley in El Cajon and
expressed dismay about what had happened. Smith responded that she needed to
get out of town and to keep her mouth shut. That evening, Stark was still upset;
she got drunk and told Joseph Brown, a former boyfriend, that she had helped two
men get inside the house of a man who owed a drug dealer a large sum of money
and that, once inside, the men stabbed the occupant. Stark decided to go into
hiding.

Two days after the murder, Gehrke and Smith showed up at Phifer's motel
room, saying that they needed to leave town. Gehrke told Phifer that a woman
helped them get into the Rawsons' house; Smith said that they had "offed"

1 Rawson and that he had driven home his "Old Timer," a brand of pocketknife that
2 he owned. Phifer's fiancée, Kathleen Wheaton, became very upset and told Phifer
3 to get the men out of there, so Phifer drove Gehrke and Smith back to El Cajon.
Phifer subsequently learned that the police were looking for him, so he stopped
going to the motel room and to work for awhile.

4 On January 20, 2002, Smith bragged to a friend that he had slit someone's
5 throat. Shortly thereafter, the police arrested Gehrke and Smith for parole
6 violations, but did not charge them with the murder. The officers found Guffey's
cell phone number written on a scrap of paper in Gehrke's wallet.

7 On January 23, 2002, police located Phifer at a party; Phifer voluntarily left
8 with the officers and agreed to a taped interview. During the interview, Phifer
9 was asked whether he was afraid of Gehrke and, after he responded that he was,
one of the detectives commented that Phifer "kn(e)w Gehrke history." Phifer told
the detectives about his conversations with Guffey before the murder and that
Smith and Gehrke had confessed to killing Rawson several days afterward.

10 Based on a tip, police located Stark in early February 2002 and arrested her.
11 Stark originally claimed that she did not know anything about the stabbing or the
12 murder, but after the officers told her they knew of her involvement, showed her
13 pictures of Gehrke and Smith and told her the men were in jail, she told them
about what had happened. Although Stark was originally charged with murder,
she ultimately pleaded guilty to being an accessory after the fact to the murder.

14 In June 2002, Guffey talked to the prosecutor and a detective in a
15 confidential interview. Four months later, the district attorney charged Gehrke,
16 Smith and Guffey with one count each of conspiracy to assault and murder,
alleging that Gehrke and Smith had personally used a deadly and dangerous
weapon in committing the murder and that they suffered various prison, serious
felony and strike priors.

17 At trial, the prosecution introduced evidence of the foregoing, although
18 Phifer's trial testimony varied substantially from his statements to police and his
19 preliminary hearing testimony; he claimed he could not remember much about the
20 circumstances surrounding the murder, other than his conversation with Guffey,
21 or his prior statements because he was using drugs heavily until shortly before the
22 trial. Gehrke presented an alibi defense, introducing evidence suggesting that he
23 and Phifer worked at a house in Cardiff for seven hours on the day of the murder.
Guffey also presented alibi evidence and attempted to establish that Phifer had
asked Gehrke and Smith to assault or kill Rawson for failing to pay a drug debt.
Smith attacked Stark's credibility and argued that he was not involved in the
murder, as established by the fact that he and Gehrke did not fit the descriptions
given by the Rawsons' neighbor of the two men he saw hanging around the
neighborhood with Stark on the day of the murder and Gehrke's alibi evidence.

24 (Lodgment No. 6, People v. Gehrke, et al., No. D042984, slip op. at 3-9.)

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1 IV.

2 PETITIONER'S CLAIMS

3 (1) Petitioner's Fourteenth Amendment right to due process was violated because the
4 evidence was insufficient to support a finding that the murder was the natural and probable
5 consequence of simple assault. (Pet. at 6.)

6 (2) Petitioner's Fourteenth Amendment right to due process was violated by the failure
7 to sever his trial from the trial of his co-defendants. (Pet. at 7.)

8 (3) Petitioner's right to confront and cross-examine witnesses under the Sixth and
9 Fourteenth Amendments was violated by the admission of co-defendant Smith's extrajudicial
10 statements. (Pet. at 8.)

11 V.

12 DISCUSSION

13 For the following reasons, the Court finds that Petitioner's claims do not merit habeas
14 relief. The Court therefore recommends that judgment be entered denying the Petition.

15 **A. Standard of Review.**

16 Title 28, United States Code, § 2254(a), sets forth the following scope of review:

17 The Supreme Court, a Justice thereof, a circuit judge, or a district
18 court shall entertain an application for a writ of habeas corpus in
19 behalf of a person in custody pursuant to the judgment of a State
court only on the ground that he is in custody in violation of the
Constitution or laws or treaties of the United States.

20 28 U.S.C.A. § 2254(a) (West 2006) (emphasis added).

21 Under 28 U.S.C. § 2254(d):

22 (d) An application for a writ of habeas corpus on behalf of a
23 person in custody pursuant to the judgment of a State court shall not
24 be granted with respect to any claim that was adjudicated on the
merits in State court proceedings unless the adjudication of the
claim—

25 (1) resulted in a decision that was contrary to, or involved an
unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

26 (2) resulted in a decision that was based on an unreasonable
27 determination of the facts in light of the evidence presented in the
State court proceeding.

28 28 U.S.C.A. § 2254(d) (1)-(2) (West 2006).

1 A state court's decision may be "contrary to" clearly established Supreme Court
 2 precedent: (1) "if the state court applies a rule that contradicts the governing law set forth in [the
 3 Court's] cases" or (2) "if the state court confronts a set of facts that are materially
 4 indistinguishable from a decision of [the] Court and nevertheless arrives at a result different
 5 from [the Court's] precedent." Williams v. Taylor, 529 U.S. 362, 405-06 (2000). A state court
 6 decision may involve an "unreasonable application" of clearly established federal law, "if the
 7 state court identifies the correct governing legal rule from this Court's cases but unreasonably
 8 applies it to the facts of the particular state prisoner's case." Id. at 407. An unreasonable
 9 application may also be found, "if the state court either unreasonably extends a legal principle
 10 from [Supreme Court] precedent to a new context where it should not apply or unreasonably
 11 refuses to extend that principle to a new context where it should apply." Id.

12 "[A] federal habeas court may not issue the writ simply because the court concludes in
 13 its independent judgment that the relevant state-court decision applied clearly established federal
 14 law erroneously or incorrectly. . . . Rather, that application must be objectively unreasonable."
 15 Lockyer v. Andrade, 538 U.S. 63, 75-76 (2003) (internal quotation marks and citations omitted).
 16 Clearly established federal law "refers to the holdings, as opposed to the dicta, of [the United
 17 States Supreme] Court's decisions." Williams, 529 U.S. at 412.

18 Habeas relief is also available if the state court's adjudication of a claim "resulted in a
 19 decision that was based on an unreasonable determination of the facts in light of the evidence
 20 presented in state court." 28 U.S.C.A. § 2254(d)(2) (West 2006). In order to satisfy this
 21 provision, Petitioner must demonstrate that the factual findings upon which the state court's
 22 adjudication of his claims rest, assuming they rest on a factual determination, are objectively
 23 unreasonable. Miller-El v. Cockrell, 537 U.S. 322, 340 (2003).

24 **B. Petitioner is not entitled to habeas relief as to claim one.**

25 Petitioner first claims that there is insufficient evidence to support his conviction for
 26 second degree murder because there was insufficient evidence adduced at trial that the murder
 27 was a natural and probable consequence of the conspiracy to commit assault. (Pet. at 6.)
 28 Petitioner argues that the evidence at trial merely established that he asked Phifer to scare the

1 victim or beat him up, that Phifer was aware that Petitioner did not want the victim killed, and
2 that Phifer told Gehrke to scare or beat up the victim, not to kill him. (Memorandum of Points
3 and Authorities in Support of Petition ["Pet. Mem."] at 5-7.) This evidence, coupled with
4 Stark's testimony that she was completely surprised by the stabbing and did not see it coming,
5 is, Petitioner argues, insufficient to satisfy the natural and probable consequences doctrine under
6 California law. (Id.)

7 Respondent argues that, applying AEDPA deference, the state court's finding that the
8 murder was a natural and probable consequence of conspiracy to commit assault under the facts
9 of this case was neither contrary to nor involved an unreasonable application of clearly
10 established federal law. (Ans. Mem. at 16-19.) Respondent contends that the determination of
11 whether a criminal act was the natural and probable consequence of another criminal act is a
12 question of fact for the jury, and, under California law, where the connection between the two
13 offenses is close, as here, the conspirators could avoid liability for murder only where the target
14 offense was trivial. (Id. at 18.) The target offense was not trivial, Respondent argues, because
15 it involved aggravated assault, because Petitioner solicited Gehrke to assault the victim knowing
16 that Gehrke had previously stabbed a man during a fight, and because Petitioner had asked
17 Stanley if she knew anyone who would be willing to hit Petitioner with a car. (Id.) Petitioner
18 replies that AEDPA deference is not appropriate here because the appellate court failed to
19 directly address his claim, but only dealt with a similar claim by his co-defendants, and that the
20 appellate court's determination is in any case erroneous. (Traverse at 7-13.)

21 Petitioner presented claim one to the state supreme court in a petition for review which
22 was denied without comment or citation to authority. (Lodgment No. 8; Supplemental
23 Lodgment No. 8.) The Court must "look through" the silent denial of this claim by the state
24 supreme court to the last reasoned state court decision. Ylst v. Nunnemaker, 501 U.S. 797, 804
25 (1991). The appellate court denied this claim in a reasoned opinion, stating:

26 Under the natural and probable consequences doctrine, a conspirator is
27 liable for "the unintended acts by coconspirators if such acts are ... the reasonable
28 and natural consequence of the object of the conspiracy," even if the act was not
intended as part of the agreed-upon objective, and even if the conspirator did not
know of the act and was not present when it was committed. (*People v. Hardy*,
supra, 2 Cal.4th at p. 188, fn omitted; also *People v. Prettyman* (1996) 14 Cal.4th

1 248, 260.) Here, although there was no evidence that Guffey personally
2 participated in killing Rawson, the prosecution argued to the jury that Guffey was
3 nonetheless liable for the murder because murder was a natural and probable
4 consequence of the conspiracy among Guffey, Gehrke and Smith to assault
5 Rawson. Guffey argues that the trial court erred in denying his motion for
6 acquittal under Penal Code section 1118.1 on the murder count against him
7 because, as a matter of law, murder is not a natural and probable consequence of
8 conspiracy to commit a simple assault; alternatively, he contends the evidence was
9 insufficient to establish that Rawson's murder was a natural and probable
10 consequence of the conspiracy to assault him.

11 The determination of whether one criminal act was a natural and probable
12 consequence of another criminal act is generally a factual question to be resolved
13 by the jury in light of all the circumstances. (*People v. Nguyen* (1993) 21
14 Cal.App.4th 518, 531.) The test to be applied is an objective one: "(t)he issue
15 does not turn on the [actor]'s subjective state of mind, but depends upon whether,
16 under all of the circumstances presented, a reasonable person in the (actor)'s
17 position would have or should have known that the charged offense was a
18 reasonably foreseeable consequence" of the target offense. (*Ibid.*; see also
19 CALJIC No. 6.11 ("what a person of reasonable and ordinary prudence would
20 have expected would be likely to occur," given the circumstances).)

21 The natural and probable consequences doctrine requires a close
22 connection between the target crime and the offense actually committed and thus
23 a conspirator will not be liable for a coconspirator's commission of a very serious
24 crime, such as murder, where the target offense was "trivial." (*People v.*
25 *Prettyman, supra*, 14 Cal.4th at p. 269.) However, although Guffey argues that
26 the target offense of simple assault is trivial as a matter of law, the case law does
27 not support his contention. (See *People v. Montes* (1999) 74 Cal.App.4th 1050,
28 1054-1056 (in the context of a gang confrontation, a jury may find murder is the
natural and probable consequence of "targeted offenses of simple assault and
breach of the peace for fighting in public," regardless of whether participants
knew weapons were on hand); compare *People v. Hickles* (1997) 56 Cal.App.4th
1183, 1197.) Thus, the question presented is whether the evidence was sufficient
to support the jury's finding that murder was a natural and probable consequence
of the conspiracy to assault in this case. Under the circumstances, we conclude
that it was.

20 The evidence at trial was sufficient to permit an inference that Guffey
21 asked Gehrke, who was later joined by Smith, to hurt, or even kill, Rawson. Prior
22 to the murder, Guffey made repeated threats that he would kill Rawson and he
23 solicited Phifer to at least beat Rawson up. After Phifer turned him down, Guffey
24 approached Gehrke, who he knew had been involved in the scuffle with Guest that
25 ended in Guest being stabbed, to do the job. Guffey also asked Amber Stanley if
26 she knew anyone who would be willing to hit Rawson with a car. Shortly before
27 the murder, Guffey drove by the Rawsons' house, while Gehrke and Smith were
28 inside, and the evidence suggests that Gehrke called Guffey's cell phone from the
house. After the murder, Gehrke called Guffey from Bunch's house and Guffey
thereafter bragged to Amber Stanley that he had "got (Rawson) good."

26 Guffey nonetheless contends that the murder was not a natural and
27 probable consequence of the conspiracy because there was no evidence that he
28 knew Gehrke and Smith were armed or that they were likely to use weapons or
force against Rawson. However, it is not necessary that the defendant knew his
coconspirators were armed for him to be liable for a homicide arising out of a

1 conspiracy to assault. (*People v. Montes, supra*, 74 Cal.App.4th at p. 1056;
 2 *People v. Godinez* (1992) 2 Cal.App.4th 492, 501, fn. 5.)

3 Because there was sufficient evidence to support a finding that Rawson's
 4 murder was a natural and probable consequence of the conspiracy to assault
 5 Rawson, the trial court did not err in denying Guffey's trial motion for acquittal
 6 of the murder charge under section 1118.1. Similarly, the court did not err in
 7 denying Guffey's posttrial motion for a new trial after finding that there was
 8 insufficient evidence to establish that the object of the conspiracy was to commit
 9 murder.

10 (Lodgment No. 6, *People v. Gehrke, et al.*, D042984, slip op. at 44-47.)

11 Because the claim was adjudicated on its merits in the state courts, habeas relief is only
 12 available if that adjudication was contrary to, or involved an unreasonable application of, clearly
 13 established federal law, or was based on an unreasonable determination of the facts in light of
 14 the evidence presented at trial. *Williams*, 529 U.S. at 405-07; *Miller-El*, 537 U.S. at 340. The
 15 clearly established federal law regarding sufficiency of the evidence claims in the criminal
 16 context is set forth in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In *Jackson*, the Court held
 17 that the Fourteenth Amendment's Due Process Clause is violated, and an applicant is entitled
 18 to habeas corpus relief, "if it is found that upon the record evidence adduced at the trial no
 19 rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson*, 443
 20 U.S. at 324. In making this determination, habeas courts must respect the province of the jury
 21 to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable
 22 inferences from proven facts by assuming the jury resolved all conflicts in a manner that
 23 supports the verdict. *Id.* at 319. Once a state court fact finder has found a defendant guilty,
 24 federal habeas courts must consider the evidence "in the light most favorable to the prosecution."
 25 *Id.* Federal habeas courts must also analyze *Jackson* claims "with explicit reference to the
 26 substantive elements of the criminal offense as defined by state law." *Id.* at 324 n.16.

27 The Ninth Circuit has stated that: "After AEDPA, we apply the standards of *Jackson* with
 28 an additional layer of deference." *Juan H. v. Allen*, 408 F.3d 1262, 1275 (9th Cir. 2005). In
 29 *Allen*, the Ninth Circuit first reviewed the standard of review applied by the state appellate court
 30 to a sufficiency of the evidence claim, and found that although the state court did not cite to the
 31 relevant federal case law, "such a citation is not required 'so long as neither the reasoning nor

1 the result of the state-court decision contradicts' Supreme Court precedent." Id. at 1274 n.12,
2 quoting Early v. Packer, 537 U.S. 3, 8 (2002).

3 The state court correctly found that sufficient evidence exists to support a finding that the
4 victim's murder was a natural and probable consequence of the conspiracy engineered by
5 Petitioner to assault the victim. The state law requirements for determining whether the murder
6 was a natural and probable consequence of the target crime is, as the appellate court noted, an
7 objective test which "depends upon whether, under all of the circumstances presented, a
8 reasonable person in [Petitioner]'s position would have or should have known that the charged
9 offense was a reasonably foreseeable consequence of the target offense." (Lodgment No. 6,
10 People v. Gehrke, et al., D042984, slip op. at 45.) The jury was presented with evidence from
11 which they could reasonably conclude that the death of the victim was a foreseeable
12 consequence of the attack Petitioner commissioned on the victim. Kathleen Dockler, Petitioner's
13 ex-girlfriend, began a romantic relationship with the victim while still living with Petitioner, and
14 testified that after Petitioner found out about the relationship he twice threatened to kill the
15 victim, and that the victim was killed several days after he made the threats. (Lodgment No. 1,
16 Reporter's Tr. ["RT"] at 169-84.) Although Petitioner contends that he only asked Phifer to
17 scare or beat up the victim, the jury was presented with evidence that after Phifer indicated that
18 he was not interested in getting involved in a domestic situation, Gehrke immediately indicated
19 that he was interested, and the victim was killed two days after Phifer gave Gehrke Petitioner's
20 telephone number and told Gehrke to give Petitioner a call. (RT 531-37.) After the murder,
21 Gehrke told Phifer that they had done what Petitioner had wanted them to do, which was to stab
22 the victim. (RT 537-38.) This evidence, coupled with the state court's finding that Petitioner
23 solicited Gehrke to join the conspiracy knowing that Gehrke had previously been involved in a
24 scuffle in which someone was stabbed, provides sufficient evidence for the jury to find that
25 Petitioner commissioned Gehrke to assault and possibly stab the victim, and that murder was a
26 natural and probable consequence of the target crime. Petitioner was also linked to the
27 conspiracy by evidence that he was seen in the victim's neighborhood around the time of the
28 killing, that he received a telephone call at or around the time of the killing, and that he was

1 aware that Gehrke, Smith and Stark were inside the victim's house about to attack the victim.
 2 It was objectively reasonable for the state court to find that a reasonable person in Petitioner's
 3 position knew or should have known that the victim may have been killed as a result of the type
 4 of target crime perpetrated here.

5 Analyzing Petitioner's sufficiency of the evidence claim "with explicit reference to the
 6 substantive elements of the criminal offense as defined by state law" as the Court must, Jackson,
 7 443 U.S. at 324 n.16, the Court finds that sufficient evidence exists in the record to support the
 8 jury's finding that second degree murder was a natural and probable consequence of conspiracy
 9 to assault the victim. The appellate court's determination to that extent is objectively reasonable,
 10 and the adjudication of this claim was neither contrary to, nor involved an unreasonable
 11 application of, clearly established federal law, and was not based on an unreasonable
 12 determination of the facts in light of the evidence presented in the state courts. Accordingly, the
 13 Court recommends denying habeas relief as to claim one.

14 **C. Petitioner is not entitled to habeas relief as to claim two.**

15 Petitioner contends in claim two that his Fourteenth Amendment right to due process was
 16 violated by the failure to sever his trial from the trial of his co-defendants. (Pet. at 7.)
 17 Specifically, he argues that his defense was mutually antagonistic with the defense of his co-
 18 defendants, and that his decision to testify in his own behalf was circumscribed because the
 19 transcript of a "free talk" he had with the prosecutor prior to being charged would have been
 20 disclosed to his co-defendants if he testified. (Pet. Mem. at 10-18.)

21 Respondent argues that the trial court properly denied Petitioner's severance motion and
 22 the state appellate court's adjudication of this claim was neither contrary to nor involved an
 23 unreasonable application of clearly established law. (Ans. Mem. at 19-23.)

24 The Court will look through the silent denial of this claim by the state supreme court to
 25 the appellate court opinion, which stated:

26 When multiple defendants are jointly charged with a particular offense,
 27 they must be tried jointly unless the court, in its discretion, orders otherwise.
 28 (Pen.Code, § 1098; *People v. Alvarez* (1996) 14 Cal.4th 155, 190; see also *Zafiro*
v. United States (1993) 506 U.S. 534, 537 (recognizing that joint trials promote
 economy and efficiency).) On appeal, we review the trial court's decision for an

1 abuse of discretion, based on the facts as they appeared at the time of the hearing
 2 on the motion. (*People v. Pinholster* (1992) 1 Cal.4th 865, 932.) Though
 3 severance is left to the sound discretion of the trial court, severance should
 4 generally be granted where (a) a codefendant has made an incriminating
 5 confession, (b) the association with the codefendants is prejudicial, (c) the
 6 presentation of evidence on multiple counts is likely to create confusion, or (d)
 7 there is a possibility that at a separate trial, a codefendant would give exonerating
 8 testimony. (*Ibid.*)

9 Where, as here, the motion for a separate trial is made after the trial has
 10 commenced, the defendant cannot raise any appellate objection to its denial unless
 11 the joint trial created “a gross unfairness” that deprived him of a fair trial or due
 12 process. (*People v. Burns* (1969) 270 Cal.App.2d 238, 251-252; see also *People*
 13 *v. Pinholster*, *supra*, 1 Cal.4th at p. 933.) Guffey contends that such unfairness
 14 resulted here because (A) if he had been tried separately, he would have been able
 15 to take the stand without having to disclose to counsel for Gehrke and Smith the
 16 transcript of his free-talk interview; and (B) his defense was mutually antagonistic
 17 with those of Gehrke and Smith. Gehrke and Smith join in Guffey’s argument,
 18 but do not make any independent argument that their constitutional rights were
 19 likewise violated.

12 A. The Free-Talk Interview

13 Guffey contends that because he was denied a separate trial, he could not
 14 testify without having to disclose the free-talk interview to Gehrke and Smith and
 15 that this interfered with his right to testify at trial. However, it was not the joint
 16 trial, but instead the interview, that created the situation of which Guffey now
 17 complains. Guffey could not, by making the decision to engage in a free-talk
 18 interview with police, thereby require the trial court to give him a separate trial
 19 that, by statute, is disfavored in a case such as this one. For these reasons, we
 20 conclude that the fact of the joint trial did not violate Guffey’s rights to due
 21 process or a fair trial.

19 B. Antagonistic Defenses

20 The law is clear that the joint trial of defendants who have conflicting or
 21 antagonistic defenses does not necessarily violate a defendant’s due process or fair
 22 trial rights. (*People v. Morganti* (1996) 43 Cal.App.4th 643, 672-675, and cases
 23 cited therein; see *People v. Hardy* (1992) 2 Cal.4th 86, 168.) As the California
 24 Supreme Court has recognized “[n]either antagonistic defenses nor the fact that
 25 ... one defendant incriminates the other amounts, by itself, to unfair prejudice....
 26 That different defendants alleged to have been involved in the same transaction
 27 have conflicting versions of what took place, or the extent to which they
 28 participated in it, vel non, is a reason for rather than *against* a joint trial. If one
 is lying, it is easier for the truth to be determined if all are required to be tried
 together.” (*People v. Hardy*, *supra*, 2 Cal.4th at p. 169, fn. 19, quoting *Ware v.*
Commonwealth (Ky.1976) 537 S.W.2d 174, 177.) Thus, a defendant who
 challenges a joint trial on the basis of antagonistic defenses must establish that the
 defenses were so irreconcilable that “the acceptance of one party’s (theory of)
 defense (would) preclude the acquittal of the other.” (*People v. Hardy*, *supra*, 2
 Cal.4th at p. 168, quoting *United States v. Ziperstein* (7th Cir.1979) 601 F.2d 281,
 285.) Such a challenge has rarely, if ever, resulted in the reversal of a conviction.
 (See *People v. Hardy*, *supra*, 2 Cal.4th at p. 168.) Guffey’s challenge similarly
 fails.

1 Here, each of the defendants denied their individual culpability and
 2 attacked the credibility of the prosecution's witnesses. Gehrke and Guffey
 3 presented evidence that each of them was somewhere other than the Rawsons'
 4 house at the time of the murder. Smith argued that the neighbor's description of
 5 the three people who were in the vicinity of the Rawsons' house on the morning
 6 of the murder and Gehrke's alibi evidence established that two other men
 7 accompanied Stark to the Rawsons' home and committed the murder. These, the
 8 defendants' primary theories of defense at trial, were not at all conflicting or
 9 antagonistic.

10 In addition to presenting an alibi defense on behalf of his client, Guffey's
 11 counsel attempted to elicit evidence, and argued, that Phifer had sent Gehrke and
 12 Smith to assault or kill Rawson for failing to pay a drug debt. Further, Gehrke's
 13 counsel argued that the nature of Rawson's wounds suggested the crime was one
 14 of passion, implying that Guffey was the killer. Smith also introduced evidence
 15 in an attempt to suggest that Guffey might have committed the murder.

16 Although these theories were antagonistic to Guffey's defense, they were
 17 largely based on evidence presented by the prosecution as part of its case in chief
 18 and raised by argument. To the extent that Guffey's codefendants elicited
 19 evidence suggesting Guffey's direct involvement in the murder, Guffey does not
 20 explain why this evidence would not have been admissible in a separate trial
 21 against him if the prosecution had decided to pursue a similar theory. Under these
 22 circumstances, the fact that the defendants were tried jointly did not violate
 23 Guffey's rights to due process or a fair trial. (*People v. Keenan* (1988) 46 Cal.3d
 24 478, 500; *People v. Morganti, supra*, 43 Cal.App.4th at p. 675; see also *People v.*
 25 *Pinholster, supra*, 1 Cal.4th at p. 933 ("a defendant's natural tendency to shift
 26 blame onto a codefendant is not in itself a sufficient ground for severance."))

27 (Lodgment No. 6, *People v. Gehrke, et al.*, D042984, slip op. at 41-44.)

28 Petitioner argues that his federal due process rights were violated by the failure to sever
 his trial, citing *Zaffro v. United States*, 506 U.S. 534, 539 (1993), and because his right to testify
 in his own behalf was circumscribed by the holding of the trial judge that the transcript of the
 free talk would be turned over to the other defendants if he testified, citing *Rock v. Arkansas*,
 483 U.S. 44, 51 (1987). The Court will address these two issues separately.

29 **a) Failure to sever trial**

30 The United States Supreme Court has observed that there is a heightened risk of prejudice
 31 where defendants "are tried together in a complex case and they have markedly different degrees
 32 of culpability." *Zaffro v. United States*, 506 U.S. 534, 539 (1993). The *Zaffro* Court was careful
 33 to note that such prejudice flows from the intrusion joint trials may have on the accused's
 34 established federal Constitutional rights, such as introduction of evidence which is technically
 35 admissible against only one co-defendant, or the unavailability of exculpatory evidence that

1 would otherwise be available if the defendant were tried alone. Id., citing Bruton v. United
2 States, 391 U.S. 123 (1968), and Kotteakos v. United States, 328 U.S. 750 (1946).

3 As the appellate court correctly observed, the majority of the defenses presented by the
4 various defendants at Petitioner's trial were not antagonistic. The two defendants who
5 committed the assault and murder took the position that they did not commit the crimes.
6 Because Petitioner was accused of soliciting those two defendants, his own defense was
7 bolstered by the innocence defense of his co-defendants. Petitioner presented the additional
8 defense that someone other than himself had solicited the assault on the victim. The appellate
9 court recognized that there was a certain aspect of the defenses which were antagonistic to
10 Petitioner. This included the fact that Gehrke argued that the nature of the wounds suggested
11 a crime of passion, thereby implicating Petitioner due to the evidence that he was upset when
12 he found out about the relationship between the victim and his ex-girlfriend. In addition, Smith
13 attacked Stark's credibility and argued that he did not fit the description of the men seen in the
14 neighborhood. However, the appellate court also correctly found that Petitioner had failed to
15 establish that such evidence would have been inadmissible had he been tried separately. Because
16 Petitioner has not established the violation of any federal Constitutional right flowing from the
17 failure to sever the trials, he has failed to demonstrate that the state court's adjudication of this
18 claim was contrary to, or involved an unreasonable application of, clearly established federal
19 law. Zaffro, 506 U.S. at 539; Williams, 529 U.S. at 405-07.

20 **b) Right to testify**

21 Petitioner contends that the decision whether to testify at trial was circumscribed by the
22 ruling of the trial judge that if he were to testify the transcript of his free talk would be provided
23 to his co-defendants. As set forth above, the appellate court denied this claim, stating:

24 However, it was not the joint trial, but instead the interview, that created the
25 situation of which Guffey now complains. Guffey could not, by making the
26 decision to engage in a free-talk interview with police, thereby require the trial
27 court to give him a separate trial that, by statute, is disfavored in a case such as
28 this one. For these reasons, we conclude that the fact of the joint trial did not
violate Guffey's rights to due process or a fair trial.

(Lodgment No. 6, People v. Gehrke, et al., D042984, slip op. at 42.)

1 The agreement reached between Petitioner, his counsel and the deputy District Attorney
2 stated that the government as well as the other defendants could use any inconsistent statements
3 made during the free talk to impeach Petitioner if he testified. (Lodgment No. 1, Reporter's Tr.
4 ["RT"] at 1587-88.) Petitioner's counsel argued extensively at trial that the free talk should not
5 be turned over to the other defendants if Petitioner testified. Counsel argued there was
6 information in the free talk which had not yet come out at trial which was damaging to
7 Petitioner, including information about events of which the other defendants were not aware, and
8 such information would not constitute impeachment because Petitioner would not testify as to
9 those events. (RT 1589-90.) Petitioner has identified no clearly established federal law
10 protecting him from being cross-examined with prior inconsistent out-of-court statements which
11 were freely given, such as the free talk here, or in protecting such statements from discovery.
12 In fact, both the trial and appellate courts found that the free talk contained no material required
13 to be turned over to the defense under Brady v. Maryland, 373 U.S. 83 (1963), or any
14 information which would have assisted the other defendants in defending the charges against
15 them. (Lodgment No. 6, People v. Gehrke, et al., D042984, slip op. at 19-20.) Petitioner has
16 not attempted to challenge those findings, which are entitled to a presumption of correctness in
17 this Court. See Sumner v. Mata, 449 U.S. 539, 545-47 (1981) (stating that deference is owed
18 to factual findings of both state trial and appellate courts).

19 The appellate court's adjudication of claim two was neither contrary to, nor involved an
20 unreasonable application of, clearly established federal law, and was not based on an
21 unreasonable determination of the facts. Accordingly, the Court recommends denying habeas
22 relief with respect to claim two.

23 **D. Petitioner is not entitled to habeas relief as to claim three.**

24 Petitioner contends in claim three that the admission of out-of-court statements by co-
25 defendant Smith to prosecution witness Phifer violated his right to confront and cross-examine
26 witnesses. (Pet. at 5.) Specifically, Petitioner contended in the state appellate and supreme
27 courts that the admission of Phifer's testimony that after the killing, co-defendant Smith said "we
28 offed him man," indicating they killed the victim, which incriminated Petitioner by implication

1 through the use of the pronoun “we,” and “I sent it on home with the old, the old timer,”
 2 referring to a knife Smith had which he called the old timer, indicating Smith stabbed the victim,
 3 constituted Bruton/Aranda¹ error. (Lodgment No. 8 at 28; Lodgment No. 7 at 16-18; Lodgment
 4 No. 3 at 18-25.)

5 Respondent contends that the adjudication of this claim by the state court was consistent
 6 with federal law and was a proper application of the rule in Bruton because Petitioner was not
 7 present when Smith made the statements and no reasonable jury would think that Smith was
 8 referring to Petitioner. (Ans. Mem. at 23-25.)

9 The Court will look through the silent denial of this claim by the state supreme court to
 10 the appellate court opinion. The appellate court stated:

11 Prior to trial, Gehrke moved to sever his trial from those of his
 12 codefendants or to exclude Smith’s statements to Phifer implicating him in
 13 Rawson’s murder, arguing that the admission of those statements would violate
 14 his constitutional rights of confrontation and cross-examination. Satisfied that the
 statement could be admitted as an adoptive admission, the court denied the motion
 to sever and allowed the statements to be introduced at trial. Gehrke argues that
 the court erred in so doing, an argument in which Guffey joins.

15 Pursuant to the adoptive admissions exception to the hearsay rule, “[i]f a
 16 person is accused of having committed a crime, under circumstances which fairly
 17 afford him an opportunity to hear, understand, and to reply, and which do not lend
 18 themselves to an inference that he was relying on the constitutional right of silence
 19 guaranteed by the Fifth Amendment to the United States Constitution, and he fails
 20 to speak, or he makes an evasive or equivocal reply, both the accusatory statement
 21 and the fact of silence or equivocation may be offered as an implied or adoptive
 22 admission of guilt.” (*People v. Fauber* (1992) 2 Cal.4th 792, 852, quoting *People*
v. Preston (1973) 9 Cal.3d 308, 314.) The theory underlying this exception is that
 “the natural reaction of an innocent man to an untrue accusation is to enter a
 prompt denial” (*People v. Simmons* (1946) 28 Cal.2d 699, 712) and if the accused
 fails to act as an innocent person would be expected to in the face of an
 accusation, an inference of consciousness of guilt may properly be drawn
 therefrom. (*People v. Green* (1952) 111 Cal.App.2d 794, 798.)

23 There are two requirements to satisfy the hearsay exception for adoptive
 24 admissions: the party must (1) have had knowledge of the content of the
 declarant’s statement, and (2) with such knowledge, have used words or conduct

25 ¹ See Bruton v. United States, 391 U.S. 123, 135 (1968) (holding that “there are some contexts
 26 in which the risk that the jury will not, or cannot, follow instructions [to assess the impact of a statement
 27 of a co-defendant as to that defendant only and not any other co-defendants] is so great, and the
 28 consequences of failure so vital to the defendant, that the practical and human limitations of the jury
 system cannot be ignored.”) and People v. Aranda, 63 Cal.2d 518 (1965) (finding that admission of
 confession implicating co-defendant in joint trial resulted in miscarriage of justice notwithstanding jury
 instruction that the confession was admissible only against confessing defendant).

1 indicating his adoption of, or his belief in, the truth of such hearsay statement.
 2 (*People v. Combs, supra*, 34 Cal.4th at p. 843, italics omitted; Evid.Code, §1221.)
 3 The trial court may admit the proffered evidence of an adoptive admission if the
 4 evidence supports a reasonable inference that these preliminary facts exist and
 5 then the jury must determine whether an adoptive admission was actually made.
 6 (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1011.)

7 Gehrke argues that the adoptive admissions exception to the hearsay rule
 8 does not apply here because there was no evidence establishing either that he was
 9 present at the time Smith admitted having killed Rawson or that he heard Smith
 10 make that statement. However, in his police interview, Phifer indicated that
 11 Gehrke and Smith came to his motel room together and that after Gehrke told him
 12 they needed to get out of town, Smith blurted out that they had “offed” Rawson.
 13 This evidence was sufficient to support an inference that Gehrke was present and
 14 able to hear Smith’s statements and thus was sufficient to support the trial court’s
 15 determination to submit the issue to the jury.

16 Gehrke also contends that Smith’s statements did not constitute adoptive
 17 admissions by him because Smith’s use of the word “we” was ambiguous and
 18 might not have referred to him, in which case he would have had no reason to
 19 object or to deny any involvement in the murder. Smith’s choice of terminology,
 20 however, goes to the weight rather than the admissibility of his statements. In
 21 light of the evidence that Gehrke and Smith arrived at Phifer’s motel room
 22 together and were the only people talking to Phifer when Smith made the
 23 statements and that Gehrke commented repeatedly that they “gotta git,” the jury
 24 could reasonably conclude that Smith’s use of the word “we” referred to Smith
 25 and Gehrke.

26 Finally, Gehrke contends that Phifer was unreliable as a witness and thus
 27 Phifer’s statements could not support the trial court’s decision to submit the
 28 proffered evidence of the adoptive admission for the jury’s consideration.
 29 Notably, Gehrke cites no authority in support of this argument, which is
 30 unpersuasive in any event. “[T]he evidence as to the existence of the preliminary
 31 facts for admissibility of a declarant’s hearsay statement against a party as the
 32 party’s adoptive admission need not convince the trial judge, by a preponderance
 33 of the evidence, that such preliminary facts exist. The trial judge needs [only] to
 34 be convinced . . . that the evidence is sufficient for a reasonable trier of fact to find
 35 that the preliminary facts exist. . . .” (*People v. Pic’l* (1981) 114 Cal.App.3d 824,
 36 860, disapproved on other grounds in *People v. Kimble* (1988) 44 Cal.3d 480,
 37 498.) The trial court properly concluded that the evidence was sufficient to
 38 support the jury in finding that the requisite preliminary facts existed and that the
 39 jury could properly assess Phifer’s credibility in determining whether Smith’s
 40 statements to Phifer constituted adoptive admissions by Gehrke.

41 (Lodgment No. 6, *People v. Gehrke, et al.*, D042984, slip op. at 10-15.)

42 “The Sixth Amendment’s Confrontation Clause provides that, ‘(i)n all criminal
 43 prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against
 44 him.’ We have held that this bedrock procedural guarantee applies to both federal and state
 45 prosecutions.” *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (citing *Pointer v. Texas*, 380
 46 U.S. 400, 406 (1965)). The confrontation clause “guarantees the defendant a face-to-face

1 meeting with witnesses appearing before the trier of fact.” Coy v. Iowa, 487 U.S. 1012, 1016
2 (1988). The physical confrontation “enhances the accuracy of factfinding by reducing the risk
3 that a witness will wrongfully implicate an innocent person.” Maryland v. Craig, 497 U.S. 836,
4 846 (1990). The introduction of prior testimonial statements of a witness violates a defendant’s
5 confrontation rights unless the person who made the statements is unavailable to testify and there
6 was a prior opportunity for cross-examination. Crawford, 541 U.S. at 68.

7 The Supreme Court in Bruton specifically left open the issue regarding whether the
8 Confrontation Clause would be offended by the admission of a co-defendant’s statement which
9 satisfied an exception to the hearsay rule, such as the adoptive admission exception relied upon
10 by the appellate court here. Bruton, 391 U.S. at 128 n.3 (stating that: “we intimate no view
11 whatsoever that such exceptions necessarily raise questions under the Confrontation Clause.”)
12 The appellate court here recognized (see Lodgment No. 6, People v. Gehrke, et al., No D042984
13 slip op. at 11), that the Supreme Court revisited the issue it had left open in Bruton in White v.
14 Illinois, 502 U.S. 346 (1992), where it held that admission of statements by a four-year old girl
15 to her babysitter, her mother, a police officer, an emergency room nurse and a doctor, each of
16 which satisfy the “spontaneous exclamation” and “statements made for medical treatment”
17 exceptions to the hearsay rule, did not violate the Confrontation Clause even though the
18 declarant did not testify at trial and was not “unavailable,” because the statements were
19 necessarily made under conditions “that provide substantial guarantees of their trustworthiness.”
20 Id. at 355-56.

21 The Supreme Court has since abrogated that approach, at least with respect to
22 “testimonial” statements, holding in Crawford that recorded testimonial statements cannot be
23 admitted at trial unless the declarant is unavailable to testify and the defendant had a prior
24 opportunity to cross-examine the declarant about the statement. Crawford, 541 U.S. at 59.
25 Although Crawford stated that it “need not definitively resolve whether [White] survives
26 [Crawford],” it is clear that, to the extent White survives, it should be limited to situations where
27 the statements were non-testimonial. Crawford, 541 U.S. 61. The Ninth Circuit has held, pre-
28 Crawford, that the adoptive admission exception to the hearsay rule does not “automatically

1 satisfy the Confrontation Clause, at least where the third-party statements alleged to have been
2 adopted have probative value independent of the fact they may have been adopted by the
3 defendant.” United States v. Monks, 774 F.2d 945, 952 (9th Cir. 1985).

4 The appellate court’s finding that the introduction of Smith’s admission did not violate
5 the Confrontation Clause because it was an adopted admission was neither contrary to nor
6 involved an unreasonable application of Bruton, because Bruton specifically declined to address
7 that issue. The appellate court’s decision did not involve an unreasonable application of
8 Crawford because Smith’s statement was non-testimonial, and Crawford does not recognize non-
9 testimonial statements as implicating the Confrontation Clause. Crawford, 541 U.S. at 68. To
10 the extent White survived Crawford, the appellate court’s finding was neither contrary to nor
11 involved an unreasonable application of White because the statement fell within a firmly
12 established hearsay exception and was made under conditions which render it reliable.

13 However, even to the extent that Petitioner could demonstrate that a Confrontation Clause
14 violation occurred, or that the state court adjudication of his claim was objectively unreasonable,
15 he must also demonstrate that the error was not harmless in order to be entitled to federal habeas
16 relief. “Confrontation Clause violations are subject to harmless error analysis, because ‘the
17 Constitution entitles a criminal defendant to a fair trial, not a perfect one.’” United States v.
18 Nielsen, 371 F.3d 574, 581 (9th Cir. 2004), quoting Delaware v. Van Arsdall, 475 U.S. 673,
19 680-81 (1986)). “Evidence erroneously admitted in violation of the Confrontation Clause must
20 be shown harmless beyond a reasonable doubt, with courts considering the importance of the
21 evidence, whether the evidence was cumulative, the presence of corroborating evidence, and the
22 overall strength of the prosecution’s case.” Id., quoting United States v. Bowman, 215 F.3d 951,
23 961 (9th Cir. 2000). Habeas relief in this Court is not available “unless the error resulted in
24 ‘substantial and injurious effect or influence in determining the jury’s verdict,’ . . . or unless the
25 judge ‘is in grave doubt’ about the harmlessness of the error.” Medina v. Hornung, 386 F.3d
26 872, 877 (9th Cir. 2004), quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) and O’Neal
27 v. McAninch, 513 U.S. 432, 436 (1995). “The relevant inquiry is whether the [error] actually
28 harmed the appellant.” Medina, 386 F.3d at 877; see also Fry v. Pliler, 552 U.S. ___, 127 S.Ct.

1 2321, 2327 (2007) (holding that harmless error analysis is still required after a showing that the
2 state court opinion was contrary or involved an unreasonable application of clearly established
3 federal law because 2254(d) “sets forth a precondition to the grant of habeas relief . . . , not an
4 entitlement to it.”)

5 Smith’s statements were cumulative to other evidence that Smith and Gehrke killed the
6 victim, including the fact that a neighbor of the victim saw two men and a woman who looked
7 out of place walking in the neighborhood shortly before the murder. Most notably, Stark was
8 present during the killing and testified as to the actions of Gehrke and Smith. There was also
9 evidence that Gehrke and Smith showed up unexpectedly at a friend’s house shortly after the
10 murder where they requested permission to clean up, and thereafter called Petitioner.

11 In determining whether the Confrontation Clause error in admitting Smith statements was
12 harmless, the Court must consider “the importance of the evidence, whether the evidence was
13 cumulative, the presence of corroborating evidence, and the overall strength of the prosecution’s
14 case.” Nielsen, 371 F.3d at 581. Respondent contends that Smith’s admission was not important
15 evidence against Petitioner because Petitioner was not present when Smith made the remarks and
16 it would have been impossible for a jury to think that Smith was talking about Petitioner when
17 he made the statements. (Ans. Mem. at 24.) Smith’s statement merely supported a finding that
18 Smith and Gehrke killed the victim, and as such implicated Petitioner only in the sense that
19 Petitioner was accused of hiring Gehrke to attack the victim. Smith’s statement was cumulative
20 to Stark’s testimony and other evidence that Smith and Gehrke killed the victim, and Petitioner’s
21 guilt was corroborated not only by Stark’s testimony but by the evidence regarding his actions
22 before and after the killing. The alleged error therefore did not have a “substantial and injurious
23 effect or influence in determining the jury’s verdict,” and the Court “is ‘not in grave doubt’
24 about the harmlessness of the error.” Medina, 386 F.3d at 877.

25 The appellate court’s adjudication of claim three was neither contrary to, nor involved an
26 unreasonable application of, clearly established federal law. Even assuming a Confrontation
27 Clause violation occurred with respect to either statement, and/or that the appellate court opinion
28 was contrary to or involved an unreasonable application of clearly established federal law, any

1 error was harmless. Accordingly, the Court recommends denying habeas relief with respect to
2 claim three.

3 **VI.**

4 **CONCLUSION AND RECOMMENDATION**

5 For all of the foregoing reasons, **IT IS HEREBY RECOMMENDED** that the Court
6 issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing
7 that Judgment be entered denying the Petition.

8 **IT IS ORDERED** that no later than **September 28, 2009** any party to this action may file
9 written objections with the Court and serve a copy on all parties. The document should be
10 captioned "Objections to Report and Recommendation."

11 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with the
12 Court and served on all parties no later than **ten days after being served with the objections**.
13 The parties are advised that failure to file objections with the specified time may waive the right
14 to raise those objections on appeal of the Court's order. See Turner v. Duncan, 158 F.3d 449,
15 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156 (9th Cir. 1991).

16 DATED: August 28, 2009

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19 **CATHY ANN BENCIVENGO**
20 United States Magistrate Judge
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